Supreme Court, U.S.
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No. 95-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HENRI COURIER DE MERE,

Petitioner,

v.

ISHWAR D. JAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When presented with a petition to compel arbitration between two foreign parties under Chapter 2 of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does a United States District Court have authority to compel arbitration within its own district and appoint an arbitrator, if the parties' arbitration agreement does not specify a location for arbitration or a method for appointing an arbitrator and the district court's subject matter jurisdiction arises solely under § 203 of the Federal Arbitration Act?

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Respondent, Ishwar D. Jain, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 51 F.3d 686 (7th Cir. 1995).

STATEMENT OF THE CASE

Respondent Ishwar D. Jain ("Jain") is a citizen of India who currently resides in New Delhi, India. Petitioner, Henri Courier de Mere ("de Mere") is a citizen of France. de Mere is the inventor and owner of certain patents pertaining to electronic ballasts for gas discharge lamps such as fluorescent lamps.

On November 12, 1992, the parties entered into a written agreement providing, in part, that Jain assist de Mere in marketing his inventions and negotiating license agreements on a worldwide basis. ("Agreement"). The Agreement initially was negotiated in Germany, Switzerland, Malta and India and was executed, in its final form, in Mettray, France. In consideration for Jain's efforts, the Agreement provides that Jain receive 10% of all amounts received by de Mere.

In performance of the Agreement, Jain promoted and negotiated a license agreement between de Mere and Motorola Lighting, Inc. of Buffalo Grove, Illinois ("Motorola"). These negotiations took place in Illinois and required the presence of both Jain and de Mere in the Northern District of Illinois for a period of over five months. As a result of Jain's efforts, de Mere and Motorola entered into a license agreement on August 25, 1993 whereby de Mere was paid an advanced royalty payment according to the following schedule:

1. $250,000 within seven days of the execution of the agreement;
2. $250,000 by 12/31/93; and
3. $500,000 upon initial shipment of product but not later than July 1, 1994

("Motorola Agreement"). The Motorola Agreement further provided for ongoing royalty payments for subsequent sales of the licensed product.

In accordance with the Agreement, de Mere compensated Jain 10% of the first advanced royalty payment, or $25,000. Subsequently, however, de Mere refused to compensate Jain 10% of the December 31, 1993 payment as provided for by the Agreement. de Mere has refused to pay any further royalty payments called for by the Agreement.

Paragraph 10 of the Agreement contains a provision whereby the parties agree to arbitrate any disagreement arising out of the contract. This provision states:

> Any disagreement arising out of this contract may only be presented to an arbitrary commission applying the French laws.

The provision is silent as to the location of the arbitration or the method of appointment of the arbitrator.

On March 18, 1994, Jain delivered to de Mere a Demand for Arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The AAA designated an arbitrator and scheduled a hearing for July 25-26, 1994. de Mere, however, refused to participate in any arbitration in the Northern District of Illinois.

On June 1, 1994, Jain filed a Petition to Appoint Arbitrator and Compel Arbitration in the Northern District of Illinois. Judge Zagel issued a Memorandum Opinion and Order on August 22, 1994 denying Jain's Petition. Although finding that jurisdiction in the United States Federal District Court was appropriate pursuant to Chapter 2 of the Federal Arbitration Act ("FAA"), the District Court ruled that Chapter 2 of the FAA does not permit it to compel arbitration in this case. Specifically, the Court found that while Chapter 1 allows a district court to compel arbitration within its district, Chapter 2, § 206 permits courts to compel arbitration only in accordance with the arbitration agreement at any place therein provided for. As the arbitration agreement in this case does not specify a location for the arbitration, the Court concluded that it could not compel arbitration.

On August 26, 1994, Jain filed a Motion for Reconsideration based on § 208 of the FAA which incorporates the

provisions of Chapter 1 into Chapter 2. On September 2, 1994, although acknowledging the precedent in favor of Jain's petition to compel arbitration and appoint arbitrator, Judge Zagel denied Jain's motion for reconsideration. Specifically, Zagel ruled that the authority of § 206 is limited and that § 206 requires a location for arbitration and a method for the appointment of arbitrators be designated before a court could compel arbitration between foreign parties under the Convention. Judge Zagel held that a district court could compel arbitration in its own district using Chapter 1, § 4 only if a basis of jurisdiction *in addition* to that conferred by Chapter 2, § 203, existed.

On September 30, 1994, Jain appealed to the United States Court of Appeals for the Seventh Circuit which reversed the decision of the district court and remanded the case. The court of appeals held that the provision of § 4 allowing a court to order arbitration in its own district applies to an action under Chapter 2 and that no basis for subject matter jurisdiction beyond § 203 was necessary. The Court noted:

> Other considerations also counsel the propriety of our conclusion. The jurisdictional requirement in § 4 ostensibly prevents the federalization of a vast number of arbitration disputes that were ordinarily the domain of state courts. This federalism concern has little force where Congress has otherwise determined that international commercial arbitration agreements are appropriate matters for federal courts. Moreover, compelling arbitration in cases like the present one better comports with the language of the Convention itself. Article II(3) of the Convention states that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer

> the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed." Given that the court is properly seized of this action, it should not then be left helpless to enforce the arbitration agreement. Finally, we note that under de Mere's argument, a federal court would have less power to compel arbitration under an international agreement than a state court.

Jain v. de Mere, 51 F.3d 686, 691 (7th Cir. 1995).

On April 17, 1995, de Mere filed a Petition for Rehearing *In Banc* which was denied on May 5, 1995. The instant petition followed.

REASONS FOR DENYING THE WRIT

I.

The Seventh Circuit's Decision Does Not Conflict With That Of Any Other Circuit, Applicable Federal Statutes Or Federal Policy.

A well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court, some lower court whose judgment is final in the absence of Supreme Court review, or federal statute or policy. In the instant case there is no conflict, direct or otherwise, with a decision of another court of appeals, any other court, or with any federal statute or policy.

A. No Conflict Exists Between the Circuits.

The decision of the Court of Appeals of the Seventh Circuit in this case is in complete accord with the Ninth Circuit decision in *Bauhinia Corp. v. China Nat'l. Machinery & Equipment Import & Export Corp.*, 819 F.2d 247 (9th Cir. 1987). In *Bauhinia*, the Ninth Circuit, as

did the Seventh Circuit in the instant case, held that the provision of § 4 allowing a district court to compel arbitration in its own district applies to Chapter 2 where the arbitration agreement is silent as to location. 891 F.2d at 250. Indeed, all other courts dealing with this issue, primarily *Oil Basins, Ltd. v. Broken Hill Proprietary Co.*, 613 F. Supp. 483 (S.D.N.Y. 1985), have reached similar conclusions. In *Oil Basins* an international arbitration agreement governed by Chapter 2 of the FAA made no express provision as to location. As here, jurisdiction in *Oil Basins* was based on 28 U.S.C. § 1331 and 9 U.S.C. § 203—the international arbitration under Chapter 2 arose under the laws and treaties of the United States. 613 F. Supp. at 485. Therefore, the court compelled the arbitration to take place in its own district. *See also Rosgoscirc v. Circus Show Corp.*, 1993 U.S. Dist. LEXIS 9797 (S.D. N.Y.); *Tolaram Fibers, Inc. v. Deutsche Engineering der Voest-Alpine Industrieanlagenbau, GmbH*, 1991 U.S. Dist. LEXIS 3565 (M.D.N.C.); *Capitol Converting Co. v. Curioni*, 1989 U.S. Dist. LEXIS 13904 (N.D. Ill.).

Because no conflict exists between the instant decision of the Seventh Circuit and that of any other circuit or any other court, the petition should be denied.

B. No Conflict Exists Between the Seventh Circuit Decision and Federal Statute or Policy.

Moreover, the decision of the Court of Appeals for the Seventh Circuit does not conflict with the purpose of the Federal Arbitration Act ("FAA") or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), which Chapter 2 of the FAA implements.

In 1970, the United States became a party to the Convention which was designed to encourage the arbitration

of international commercial disputes and to unify the standards by which agreements are enforced. *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17, 94 S. Ct. 2449, 2455-56, 41 L. Ed. 2d 270 (1974). The purpose of Chapter 2 of the FAA is to implement this Convention. By acceding to the Convention, the United States joined other signatory nations in proclaiming a willingness to enforce arbitration clauses in international agreements. *Id.* at 516 n.10, 94 S. Ct. at 2451 n.10.

Despite this underlying policy in favor of arbitration, petitioner argues that Congress is presumed to be aware that it left one foreign party powerless to compel another foreign party to arbitrate in the United States where no location was designated and the district courts did not have an independent basis of jurisdiction beyond that granted to it by virtue of Chapter 2 of the FAA. In rejecting this argument the Court of Appeals for the Seventh Circuit recognized that:

> The jurisdictional requirement in Section 4 ostensibly prevents the federalization of a vast number of arbitration disputes that were ordinarily the domain of state courts. This federalism concern has little force where Congress has otherwise determined that international commercial arbitration agreements are appropriate matters for federal courts.

Thus, petitioner's theory that the independent jurisdictional requirements of Chapter 1, § 4 are a prerequisite to incorporating § 4 provisions into a Chapter 2 preceding is unpersuasive.

Moreover, in drafting Chapter 2, § 208 Congress mandated the application of Chapter 1 provisions to the extent they do not conflict with Chapter 2 or the Convention. The Court here found that the jurisdictional restrictions in § 4 conflict with the expansive jurisdictional grant set

out in §§ 202 and 203. For this reason alone, the conflicting jurisdictional restrictions of § 4 cannot be incorporated.

Further, compelling arbitration in cases like the present is the only logical result consistent with the language of the Convention itself. Article II(3) of the Convention states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed. (emphasis added)

Given that the Court is properly seized of this action, "it should not then be left helpless to enforce the arbitration agreement." 51 F.3d at 691. In fact, the Convention mandates that the district court refer the parties to arbitration. Failure to do so here because a location is not designated frustrates the essential purpose of the Convention.

Accordingly, as there is no conflict between the decision in the instant case and the applicable federal statute or policy, the petition should be denied.

II.

The Seventh Circuit's Decision Does Not Raise An Important Question Of Federal Law Which Merits Review By The United States Supreme Court.

As petitioner himself concedes, the decision of the Court of Appeals will affect few people and involve a limited number of cases. Petitioner states that the Court of Appeals "grossly overstates the perceived problem because it *only* arises in the specific instance where the agreement fails to stipulate an arbitration location *and*" where

the district court does not have an independent basis for jurisdiction beyond Chapter 2 of the FAA and the Convention. (emphasis added) Petition at 9. Petitioner admits this will probably only occur where the dispute involves entirely foreign parties and one seeks arbitration in the United States. As noted by the Court of Appeals, however, this will only occur where the second party has expressly consented to a United States forum or has contacts with that forum sufficient to meet the requirements of personal jurisdiction. Thus, as noted by the Court of Appeals, "the limited impact of our decision becomes clear." 51 F.3d at 692.

III.

The Seventh Circuit's Decision Does Not Depart From The Accepted And Usual Course Of Judicial Proceedings And Is Correct.

Chapter 2, § 208 of the FAA provides that Chapter 1 is incorporated into Chapter 2 "to the extent that [Chapter 1] is not in conflict with [Chapter 2] or the Convention. . ." 9 U.S.C. § 208. Thus, the only condition placed upon this incorporation is that the Chapter 1 provision not conflict with Chapter 2.

Chapter 2, § 206 states that a Court "may direct that the arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. Chapter 1, § 4 requires that where an arbitration agreement is silent as to the location of the arbitration, a district court can order arbitration solely within its own district. 9 U.S.C. § 4. Under the plain language of the statute, § 4 does not and cannot conflict with Chapter 2 or the Convention unless the contract expressly specifies the location for the arbitration other than the forum district. *Bauhinia*, 819 F.2d 247; *Oil Basins*, 613 F. Supp.

483. Thus, the Court of Appeals did not, as de Mere suggests, rewrite § 208 of the FAA. Rather, the Court was entirely correct in holding that one foreign party can compel another foreign party to arbitrate in the United States where the second party has expressly consented to a United States forum or has contacts with the forum sufficient to meet the requirement of personal jurisdiction.

de Mere also argues that because Chapter 1, § 4 contains jurisdictional limits in addition to granting a district court authority to order arbitration within its own district, Congress intended those jurisdictional limits to be applicable to international arbitrations arising under Chapter 2 and the Convention. As previously stated, however, Congress also intended § 208 to incorporate Chapter 1 provisions into Chapter 2 to the extent that they do not conflict with Chapter 2 or the Convention. The provisions of § 4 embracing jurisdictional restrictions *do* conflict with the jurisdictional grants of §§ 202 and 203 in international commercial arbitration disputes. Section 203 provides an express grant of subject matter jurisdiction to federal courts over any action or proceeding falling under the Convention. 9 U.S.C. § 203. Thus, as held by the Court of Appeals for the Seventh Circuit, while the provisions of § 4 allowing a court to compel arbitration in its own district should apply to an action under Chapter 2, those provisions restricting jurisdiction should not.

Finally, the decision of the Court of Appeals in the instant case is the only decision which follows the mandate of the Convention to which the United States became a party. The Convention *requires* that the United States refer the parties to arbitration unless it finds that said Agreement is null and void, inoperative or incapable of being performed. No such argument has even been advanced by the Petitioner. Thus, failure to refer the parties

in this case to arbitration would frustrate the clear language of the Convention to which the United States has been a party for over 25 years.

CONCLUSION

For each of the reasons set forth herein, Respondent respectfully requests that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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